



Shelby County Board of Commissioners

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SHELBY COUNTY GOVERNMENT MWBE/LOSB POLICY AND PROCEDURES MANUAL WITH ORDINANCES & AMENDMENTS

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SECTION I: M/WBE

I. Introduction

Minority and Woman-Owned Business Enterprises (M/WBE) and Locally Owned Small Businesses (LOSB) Programs.

MISSION

Shelby County Government encourages and fosters the growth and development of Minority and Woman-Owned Business Enterprises (M/WBE) and Locally Owned Small Businesses (LOSB). The implementation of Shelby County Government's M/WBE/LOSB Policy and Procedures Manual shall encourage all Shelby County Departments to utilize certified businesses to achieve this goal.

This program shall be applicable to Contractors, Vendors and Consultants of contracts, related subcontracts and concessionaires as well as to those certain Commercial developers and contractors on contracts described herein. These policies, procedures and contract clauses shall apply to all such contracts and agreements, unless the provisions herein are in conflict with state or federal laws or rules and regulations promulgated there under.

II. SCOPE OF M/WBE PROGRAM

It is the policy of the Shelby County Government (County) as articulated in *Article II Section 2.02 C and Article V Section 5.13. Charter (Charter)* to implement a procurement program geared toward increasing the percentage of procurement dollars spent with Minority and Woman Business Enterprises (M/WBE) correlated to the availability level of M/WBEs operating within the County.

Shelby County Government Office of Equal Opportunity Compliance (EOC) has the overall responsibility to administer, monitor and enforce M/WBE policies, standards and procedures as well as govern the implementation, interpretation and application of this business process in a manner to achieve overall fairness.

The Equal Opportunity Compliance Office shall manage and monitor the County's utilization of M/WBEs. Specifically, the EOC shall:

- A. Adopt rules and procedures to implement the M/WBE Program.
- B. Create, maintain, and distribute the directory of certified M/WBEs.
- C. Regularly review the progress of each County department, office, board and agency's achievement of the M/WBE goals.
- D. Ensure that County bids and proposals adhere to the procurement procedures contained herein.
- E. Monitor all prime contracts with M/WBE goals throughout the duration of the contract to ensure that all efforts are made to comply with goals.
- F. Present an annual M/WBE Utilization Report to the Shelby County Board of Commissioners.
- G. The EOC shall be adequately staffed with personnel who have the requisite, knowledge, and ability to implement the M/WBE Program objectives and responsibilities.
- H. The EOC shall collaborate with the Purchasing Administrator to adopt rules and procedures to implement the M/WBE program.

III. ROUTINE COUNTY-WIDE TRAINING

Routine county-wide training shall be provided to ensure that all personnel are knowledgeable about the M/WBE Program requirements and are capable of supporting the M/WBE Program and its policies and objectives. The training program shall be conducted by the EOC, and the following three training programs shall be implemented:

A. Annual Training Seminar

The Annual Training Seminar shall inform staff of any changes to the M/WBE Program policy and procedures and promote the M/WBE Program enhancements. An internal webpage shall be maintained in order to provide assistance, information, and responses to questions posed by County staff.

B. New Employee Training

New employee training shall be held by the Equal Opportunity Compliance to ensure that new employees understand the established policies and procedures. An electronic copy of the M/WBE Program Training Manual shall be provided to each new County employee.

C. M/WBE Program Training Manual

An M/WBE Program Training Manual describing the M/WBE Program mission, policy, and procedures shall be available to new staff electronically and shall be available for download on the County's Intranet.

IV. DEFINITIONS (Amended by ordinance #500)

- A. "Award"** shall mean the selection of a vendor for a contract. Contract awards are made by the County to a prime contractor and by a prime contractor to a subcontractor.
- B. "Bidder"** shall mean any individual, company, or association seeking the award of a contract or subcontract on a project that is at least partially funded by the County.
- C. "Commercially Useful Function"** shall mean a subcontract fulfilled by a bidder responsible for the materials, supplies, and services used in the performance of the contract. To determine whether a subcontractor is performing a Commercially Useful Function, the subcontracted work shall be evaluated with respect to normal industry practices, including whether the contracted amount that the subcontractor is to be paid is commensurate with the work that it is contracted to perform. The subcontractor does not perform a Commercially Useful Function if its role is limited to being a participant in a contract through which funds are passed in order to convey the appearance of meaningful and useful subcontractor participation.
- D. "Contract"** shall mean a mutually binding legal relationship or any modification thereof obligating the vendor to furnish commodities or services, including construction and professional services, and the County or the County's prime contractor to pay for them.

- E. **“Control”** shall mean the authority of an individual or business owner to sign responses to solicitations and contracts, to make price negotiation decisions, to sell or liquidate the business, and to direct the day-to-day business management and operations without interference from others.
- F. **“Eligible Purchase”** shall mean all purchases made by purchase order or contract, excluding those with governmental or non-profit entities.
- G. **“Good Faith Effort”** shall mean a documentation of the steps taken by a bidder to comply with the M/WBE goals and procedures established by this Ordinance and the requirements set forth in the County’s solicitations.
- H. **“Joint Venture, Consortium, and Partnership”** shall mean a business entity that is formed to contract with Shelby County through the M/WBE Business Purchasing Program. The business entity shall have written documentation demonstrating that the eligible minority/women owned business as defined herein has a real, substantial, and continuing ownership interest of at least fifty-one percent (51%), and shall be responsible for the daily management and control of the project. The M/WBE joint venture partner must solely complete specific discreet items of the work. The scope of the work should be a commercially useful function. Eligible Joint Venture can be counted toward the M/WBE sub goals if the M/WBE Joint Venture is a part of the eligible group. EOC Administrator shall determine whether the Joint Venture is eligible under this section.
- I. **“Minority Business Enterprise”** shall mean a for-profit business enterprise that is 51 percent (51%) owned and controlled by one or more minority persons. The qualifying minority groups are defined by the United States Small Business Administration under *13 CFR 124.103* and the United States Equal Employment Opportunity Commission.
- J. **“African Americans”** shall mean persons having origins in any of the Black racial groups of Africa.
- K. **“Hispanic Americans”** shall mean persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.
- L. **“Asian Americans”** shall mean persons whose origins are in Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao,

Fiji, Tonga, Kiribati, Tuvalu, or Nauru, or Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal).

- M.** “**Native Americans**” shall mean persons who are enrolled members of a federally or state-recognized Indian tribe, Eskimos, Aleuts, or Native Hawaiians.
- N.** “**Minority and Woman Business Enterprise Availability**” shall mean the number of minority and/or woman-owned businesses located within the County that are willing and able to provide the commodities and services procured by the County.
- O.** “**Prime Contractor**” shall mean the individual or business that has a contract with the County and that has full responsibility for completing the terms of the agreement.
- P.** “**Race-conscious**” shall mean any M/WBE Program component whereby the race or gender of the business owner is taken into consideration.
- Q.** “**Race-neutral**” shall mean any M/WBE Program component whereby the race or gender of the business owner is not taken into consideration.
- R.** “**Subcontractor Utilization Plan**” shall mean the documentation submitted by a prime contractor at the time of bid opening, listing the subcontractors, sub-consultants, suppliers, or truckers proposed to meet the M/WBE subcontract goals. The Subcontractor Utilization Plan details each business’ name, certification status, and percentage of the prime contractor’s bid amount.
- S.** “**Subcontractor**” shall mean an individual or business that has a contract to perform a service or provide materials, equipment, and/or supplies as a part of the scope of work set forth in a prime contract awarded by the County.
- T.** “**User Department**” shall mean the department, office, board, agency, or authorized representative of the County that issues a requisition for a solicitation to procure commodities or services.
- U.** “**Woman Business Enterprise**” shall mean a for-profit business enterprise that is 51 percent (51%) owned and controlled by one or more women.

V. STATEMENT OF POLICY

- A. It is the Policy of Shelby County Government to take all necessary, reasonable and legal action to prevent discrimination and to ensure that all businesses, including M/WBEs, are afforded the maximum practicable opportunity to participate in the County's contracting process. The M/WBE Program shall be adopted to implement the County's M/WBE Policy in order to remedy the documented statistical underutilization that continues to adversely affect the participation of M/WBE businesses in the awarding of the County's prime contracts and subcontracts. The M/WBE Program shall ensure that County contracts are awarded in a manner that promotes economic inclusion of all segments of the business population regardless of race or gender, in order to maximize the economic vitality and development of the County.
- B. The County shall be committed to promoting fair and open competition for M/WBEs seeking to do business with the County. The County shall also ensure that prime contractors do not discriminate in their solicitation, selection, or treatment of subcontractors.
- C. The County has established goals to ensure that M/WBE utilization on construction, professional services, and commodities and services contracts reflects the level of M/WBE availability. The M/WBE goals are based on the findings of statistically significant underutilization from the 2016 Legal Analysis and Disparity Study.

VI. GOOD FAITH EFFORTS (Amended by Ordinance #500)

Good faith effort elements shall be quantified to determine whether a prime contractor has provided evidence of a good faith effort to meet the M/WBE subcontract goals. Good faith efforts review and determination shall be conducted by the Chief Diversity Supplier Officer and the Administrator of Purchasing. If no agreement can be reached, the Administrator of EOC makes the final decision. Good faith effort elements shall be quantified to determine whether a prime contractor has provided evidence of a good faith effort to meet the M/WBE subcontract goals. In order to be considered a responsive bidder, the prime contractor must demonstrate a sufficient good faith effort to achieve a minimum score of 80 percent of the required points. The point assignments and requirements to document evidence of good faith efforts are as follows:

The point assignments and requirements to document evidence of good faith efforts are as follows:

- A. Advertising - five **(5) points**: Opportunities for M/WBEs shall be advertised to certified M/WBEs in three (3) digital media outlets during the three (3) weeks prior to the bid opening. Opportunities for M/WBEs shall only be advertised in print media, if required by statute. A subcontracting opportunity shall be published online in general circulation media,

minority-focused media, trade association publications, or trade-related publications at least twice, unless the solicitation waives this requirement.

- B.** Attend the Pre-bid Meeting - five **(5) points**: Attendance at the scheduled pre-bid meetings shall be mandatory to comply with the good faith effort requirement. The contractor's name on the pre-bid meeting sign-in sheet shall serve as documentation.
- C.** Bidder's Outreach to Identify M/WBEs - fifteen **(15) points**: Contractors shall communicate with M/WBEs through personal, frequent, and persistent contact by promptly returning telephone calls, facsimiles, and emails. Correspondence logs shall list the names of the businesses, the representatives contacted by the bidder, and dates of contact. Copies of correspondence with the businesses contacted by the bidder, including the responses received, shall be provided. Documentation shall also include facsimile transmittal confirmation slips or written confirmation of receipt via email with the date of transmission. The contractor shall be required to contact at least three businesses.
- D.** Contact Follow-up - fifteen **(15) points**: Contractors are required to promptly return telephone calls, facsimiles, and emails after the initial solicitation. The follow-up shall consist of a telephone call, facsimile, or email during normal business hours at least two (2) weeks prior to the bid opening. The prime contractor shall maintain correspondence logs that list the subcontractors who were contacted, including the results of that contact. The list shall also include the names of the eligible businesses and of contact persons, as well as telephone numbers, dates of contact, and notes regarding the outcome of said contact. The record shall also identify the scope of work for which each was asked to provide a bid.
- E.** Identify Items of Work - fifteen **(15) points**: Subcontracts shall be broken down into discrete items or packages that M/WBEs may find economically feasible to perform. The documentation shall include a list with descriptions of the specific items of work solicited from eligible businesses, as well as notices and advertisements targeting M/WBE subcontractors.
- F.** Negotiate in Good Faith - fifteen **(15) points**: Contractors may not unjustifiably reject bids, quotes, or proposals prepared by eligible businesses based on the subcontractor's standing within its industry, or on membership in a specific group, organization, association, and/or political or social affiliation. A written statement with names, addresses, and telephone numbers of subcontractors contacted and the negotiated price and services shall be submitted. This list shall include dates of the negotiations and the results, and document the bids received from businesses that could provide a commercially useful function.

- G. Offer Assistance in Securing Financing, Bonding, Insurance, or Competitive Supplier Pricing - ten **(10) points**: Contractors shall provide M/WBEs with technical assistance regarding plans, specifications, and requirements of the contract in a timely manner to facilitate responses to solicitations. Contractors may not deny a subcontract solely because a certified M/WBE cannot obtain a bond, and shall make efforts to assist interested businesses in obtaining financing, bonds, and insurance required by the County, as well as provide competitive pricing. The contractor shall provide a written description of the type of assistance, the company name, contact person and telephone number, and the name of the person who provided the assistance as well as that of the supplier that offered competitive pricing.
- H. Provide Timely Written Notification - twenty **(20) points**: Contractors are required to solicit in writing subcontract bids and material quotes from relevant M/WBEs at least two (2) weeks prior to the bid opening. Relevant businesses are those that could feasibly provide the goods or services required to satisfy the terms specified in the County's solicitation. When soliciting bids, quotes, and proposals, the contractor shall provide the project name, the bidder's name, subcontract items, primary contact person's name and phone number, information on the availability of plans and specifications, and the date on which the subcontractor's written bid shall be submitted to the prime contractor. Written notification shall include verification of the transmission date, the recipient's name, and the company name. Documentation shall also include facsimile transmittal confirmation slips or written confirmation of receipt via email with the date of transmission.

VII. M/WBE PRIME CONTRACT BID DISCOUNTS (Amended by Ordinance #500)

- A. M/WBE prime contract bid discounts shall be applied to construction prime contracts. A **ten percent (10%)** bid discount on construction prime contracts shall be applied to African American and Asian American prime bidders, for a maximum **discount of \$50,000.00**. The bid discount shall be applied during the evaluation process. The discount shall lower the eligible M/WBE's bid, but shall not reduce the contract award amount. The solicitation shall describe the bid discount as applied to eligible M/WBE prime contractors. In order to qualify for the bid discount, the M/WBE prime contractor shall include in its bid a copy of the M/WBE certification approval letter issued by the M/WBE Program.
- B. M/WBE prime contract bid discounts shall be applied to commodities and services prime contracts. A **ten percent (10%) bid discount** on commodities and services prime contracts shall be applied to African American and Caucasian Female prime bidders, for a maximum **discount**

of \$50,000.00. The bid discount shall be applied during the evaluation process. In order to qualify for the bid discount, the M/WBE prime contractor shall include in its bid a copy of the M/WBE certification approval letter issued by the M/WBE Program.

- C.** M/WBE prime contract preference points shall be applied to professional services contracts. **Fifteen percent (15) preference points** shall be assigned on professional services contracts during the evaluation process for African American, Asian American, and Hispanic American prime consultants. A copy of the prime consultant's M/WBE certification approval letter issued by the M/WBE Program shall be included with the proposal or statement of qualifications. The submission requirements to receive the preference points shall be specified in the solicitation. The Consultant Review Committee (CRC) shall recommend to the Mayor the vendor deemed "lowest most responsive and responsible bidder".
- D.** A small prime contract program targeting African American and Asian American business shall be established for construction prime contracts valued under **\$5,000**. If no M/WBE bidder is found to be responsive, the bid shall be open to all available businesses. In the County's annual contract forecast and prior to its respective bid announcements, the Administrator of Purchasing shall identify construction items of work that can be unbundled into contracts valued under **\$5,000 for M/WBE** participation.
- E.** On informal bid solicitations for purchases valued at **\$25,000** or less, the Administrator of Purchasing shall target the solicitations to certified M/WBE's. There must be at least two **(2) certified M/WBE's** that provide the goods or services being procured. If no M/WBE is found to be responsive, then the County may solicit bids for the goods or services from all other vendors.
- F. RACE AND GENDER-CONSCIOUS REMEDIES (Amended by Ordinance 500)**

The race and gender conscious remedies shall be met by the ethnic and gender groups that were found to have a statistically significant underutilization on the county's prime contracts and subcontracts. Race and gender-conscious subcontract goals, prime bid discounts, and evaluation preference points are the narrowly tailored remedies to address the documented statistical disparity. The subcontract goals are based on Minority Business Enterprise (MBE) and Woman Business Enterprise (WBE) availability.

- 1) The construction subcontract goal shall be 28 percent (28%) for MBEs and the professional services subcontract goal shall be 26 percent (26%) for MBEs and 14 percent (14%) for WBEs.
- 2) The construction subcontract goal shall be met by African American businesses and the professional services subcontract goal shall be met by African American businesses and Caucasian Female businesses. The construction subcontract goal shall be applied to requests for bids, and the professional services subcontract goals shall be applied to requests for proposals as well as requests for statements of qualifications. Proof of subcontract participation shall be submitted at the time of bid opening and documented on the subcontractor utilization plan. If a bidder fails to meet the solicitation's subcontract goals, the bidder can provide evidence of a good faith effort to meet the goal. A bid that does not meet the subcontract goals or provide evidence of a good faith effort will be deemed non-responsive and therefore ineligible for award. The subcontractor utilization plan shall be reviewed at the time of bid opening for subcontractor goal compliance, verification of subcontractor certification, and evidence that the subcontractor shall perform a commercially useful function. Prime contractors are prohibited from having an exclusive relationship with subcontractors.

VIII. M/WBE PROGRAM CERTIFICATION

Participants included in the race and gender-conscious provisions of the M/WBE Program must be certified by the EOC. M/WBE certification standards include eligibility criteria for ethnicity and gender, ownership and control, residency, and license.

A. *Ethnic Groups*

The qualifying ethnic groups shall include African Americans, Hispanic Americans, Asian Americans, and Native Americans.

B. *Ownership and Control*

- 1) An eligible minority business shall be a for-profit enterprise that is 51 percent (51%) or more owned and controlled by one or more minority persons.
- 2) An eligible woman business shall be a for-profit enterprise that is 51 percent (51%) or more owned and controlled by one or more women.

C. *Residency and Licensing*

An exemption to the Shelby County residency requirement may be granted by the Administrator of EOC to those eligible minority and/or women business owners who have operated the qualifying business within Shelby County for a

minimum of two (2) years and employ a minimum of three (3) employees who are residents of Shelby County. **(Amended by Ordinance #473, 6/26/2017)**
(Amended by Ordinance #500)

D. Certification Process

- 1) The EOC shall design, implement, and manage the M/WBE certification process. The certification program shall include reciprocity with local agencies that have an M/WBE certification program which comports with the County's standards.
- 2) The principals of a business applying for certification shall certify under penalty of perjury that the information submitted to obtain certification was provided without collusion and that no violation of any federal or Tennessee antitrust laws had occurred.
- 3) Additionally, the above-mentioned principles and businesses that knowingly falsify ownership and control of said business will be prohibited from conducting business with Shelby County Government for a minimum of three (3) years after a thorough investigation and administrative hearing conducted by Shelby County Commission or an Ad Hoc Committee established by the Shelby County Commission and composed of individuals without a conflict of interest.
- 4) If principals change ownership and control of their business under contract with Shelby County Government and active participant with rights and privileges conferred under this Ordinance, said new principals must inform the EOC Administrator. If after a change in ownership and control, and the new principal qualifies as minority or women owned and controlled business under this Ordinance, said new principal shall certify with the EOC Administrator.
- 5) If the above-mentioned principals of a certified and reciprocally accepted M/WBE changes control and ownership while NOT under contract with Shelby County Government, said new principals and business must inform the EOC Administrator before bidding on any business with Shelby County Government.

IX. GENERAL M/WBE PROGRAM PROCEDURES

- A. Performance bonds shall not be required on construction contracts where the engineer's project estimate is less than \$25,000.
- B. The Consultant Review Committee (CRC) shall be established by the County Mayor and the Shelby County Board of Commissioners for the

purpose of reviewing, screening, and ranking the selection of professional architects, engineers, appraisers, and other types of consultants responding to solicitations to perform work on public works projects.

X. CONSULTANT REVIEW COMMITTEE MEMBERS (Amended by Ordinance #500)

- A.** Consultant Review Committee members shall not be actively engaged in professional consulting or employed by a design consulting business. Consultant Review Committee membership shall be comprised of representatives from the County or their designee and business community. There shall be six (6) County representatives and (3) three business community members.
- 1) Director of Public Works or his designee
 - 2) Administrator of Purchasing
 - 3) Director of the Equal Opportunity Compliance Office
 - 4) Chief Diversity Supplier Officer
 - 5) EOC Chair or his/her designee
 - 6) "Floating" representative from the user department, agency, or office of the elected official within whose jurisdiction the project is located
 - 7) Two (2) minority architecture and engineering professional, or two (2) minority professional with relevant experience in related field
 - 8) Female architecture and engineering professional, or female professional with relevant experience in a related field
- B.** Consultant Review Committee members who are County employees shall serve for the duration of their office, while the business members shall serve a (2) two-year term. The Memphis Chapter of the National Organization of Minority Architects (NOMA) and/or the National Society of Black Engineers (NSBE) shall make shall make recommendations to the County Mayor concerning the nomination of (2) minority representatives to serve on the Review Committee as professional architect and/or engineers. The Memphis Chapter of the American Institute of Architects and Society of Professional Engineers shall make recommendations to the Administrator of Purchasing who will forward the CRC recommendations to the County Mayor concerning the nomination of a professional architect or engineer to serve as a female member of the CRC and, if no representative from NOMA or NSBE can be selected the minority representatives can likewise be selected from these organizations. Architects, engineers, and other professional services providers may also apply to the Consultant Review Committee for consideration and approval. The Administrator of Purchasing shall serve as or provide a secretary to the Consultant Review Committee for consideration and approval. The Administrator of Purchasing shall serve as or provide a secretary to the

CRC. All Consultant Review Committee members shall be required to sign a conflict of interest statement to foster transparency in the County's procurement process.

- C. The Consultant Review Committee's recommendations shall be based upon criteria that include M/WBE subcontract goals and the number of the consultant's previous awards; in order to avoid repeated awards to highly used prime contractors. The selection process for award of professional services contracts shall include a written recommendation report providing the evaluation point assignment for each consultant. The recommendations shall rank all respondents and list the sub-consultant businesses included to meet the subcontract goal, along with the percent of their participation. A signed copy of each evaluator's scores and comments shall be attached to the report. The Committee's written report shall be submitted to the Administrator of Purchasing and the County Mayor for final selection.

XI. CONTRACT COMPLIANCE COMMITTEE (Amended by Ordinance #500)

The Contract Compliance Committee shall have eleven (11) members. The Committee staff shall include County managers and the business community members appointed by the Shelby County Board of Commissioners. The business members shall reflect the underutilized business populations as reported in the 2016 Legal Analysis and Disparity Study.

- A. A County Contract Compliance Committee shall serve as an oversight working group to ensure that the rules and regulations set forth in this Ordinance is implemented as stated.
- B. The Contract Compliance Committee's mission is threefold: **(1)** to advocate for M/WBE access to the County's procurement process, **(2)** review procurement procedures and policies that impact M/WBE participation, and **(3)** monitor M/WBE utilization on the County's contracts to ensure that all County departments, offices, boards and agencies adhere to the M/WBE Program requirements.
- C. The Contract Compliance Committee members shall include:
 - 1) Chairman of the Shelby County Board of Commissioners or its designee
 - 2) Shelby County Board Commissioner's EOC Committee Chair or designee
 - 3) County Mayor or designee
 - 4) Administrator of Equal Opportunity Compliance Office
 - 5) EOC Chief Diversity Supplier Officer

- D. The Business Committee members shall be representative the following associations:
- 1) Latino Memphis or similar organization
 - 2) National Association of Women Business Owners or similar organization
 - 3) Mid-South Minority Business Continuum or similar organization
 - 4) Black Business Association or similar organization
 - 5) Memphis Area Minority Contractors Association
 - 6) Associated Builders and Contractors, West Tennessee Chapter or similar organization
- E. The Administrator of the EOC shall serve as the secretary and voting member of the Committee. The secretary shall submit a monthly compliance report listing utilization by department, MBE and WBE status, non-compliant departments, and non-compliant prime contractors. Public members of the Contract Compliance Committee shall serve for a (2) two-year term. Members shall serve a maximum of three (3) full two- year terms.

XII. PAYMENTS AND PENALTIES

Payments to prime contractors shall be made within fifteen **(15) business** days of the **County Department/Elected Official** receiving an undisputed invoice. Prime contractors shall be required to pay their subcontractors within 10 days of receipt of their invoice payment from the County. The prime contractor shall be penalized if the subcontractor is not paid in a timely manner. All contracts with prime contractors shall include the following language:

- A. The penalty for non-compliance with the 10-day timely payment to subcontractor(s) shall include:
- 1) Any prime contractor who violates the timely payment term to a subcontractor more than once in a three-month period shall lose their EOC qualification number to do future business with the County for three (3) months.
 - 2) Any prime contractor who violates the timely payment term to a subcontractor more than twice in a six-month period shall lose their EOC qualification number to do future business with the County for six (6) months.
 - 3) Any prime contractor who violates the timely payment term to a subcontractor more than three (3) times in a one-year period shall lose their EOC qualification number to do future business with the County for one-year.

- B.** The prime contractor may appeal the above imposed penalty to the EOC Appeals Board.

XIII. PERIODIC REVIEW AND SUNSET CLAUSE

The factual basis upon which the race and gender-conscious provisions of the M/WBE Program are predicated shall be updated at least every five (5) years. If, at the end of five (5) years, the Shelby County Board of Commissioners finds that the purpose of this Ordinance has not been achieved, it may extend the effective date of the race and gender-conscious provisions of this Ordinance for an additional five (5) years by majority vote of the Shelby County Board of Commissioners.

XIV. REPORTING CRITERION

- A.** A subcontract monitoring system shall be implemented by the County. M/WBE and non-M/WBE subcontracting participation shall be tracked electronically in the subcontract monitoring system. The system will include a relational database application that will allow the linking of subcontractor data to the appropriate prime contract. Each prime contract shall be identified by industry classification using NIGP or NAICS codes and the procurement method. At the time of bid opening, computerized data entry forms shall capture the required information to produce the M/WBE Utilization Reports. All information that contractors enter into the subcontract monitoring system shall be reviewed by the EOC on a bi-weekly basis to ensure consistent contract compliance. A record of any discrepancies or proof of failure to comply with the contract goals and regulations shall be filed by the EOC. Customizable queries designed into the data monitoring system shall analyze the data necessary for producing the M/WBE Utilization Reports electronically.
- B.** The M/WBE Utilization Report shall include prime contract and subcontract awards and payments, categorized by industry and contractor, user department, contractor ethnicity, contractor gender, and certification status. Change orders and substitutions shall also be tracked and reported according to the categories of prime contract, user department name, project name, and the contractor's ethnicity and gender.
- C.** The M/WBE Utilization Report shall be submitted on a quarterly basis to the Shelby County Board of Commissioners. The fourth-quarter report shall include an assessment of M/WBE Program activities as well as recommendations for program enhancements. An acknowledgement of program accomplishments shall also be detailed in the M/WBE Utilization Report. The M/WBE Utilization Reports shall be posted on the M/WBE webpage and distributed electronically to registered vendors.

XV. PREQUALIFICATION CRITERION

As a prequalification criterion, a manufacturer doing business with the County shall have M/WBE distributors authorized to sell its product line at the regional or national level. The manufacturer shall provide its distributors' business information and verification of M/WBE certification on the prequalification questionnaire.

XVI. ON-SITE COMPLIANCE REVIEW INSPECTIONS

Upon the submission of a written sworn compliant of non-compliance, the EOC may conduct an on-site inspection or desk audit of the project to determine whether the prime contractor has been utilizing the subcontractor in accordance with the contractual agreement for services. During the investigation period, the payment for services may be temporarily suspended pending the outcome of the investigation. The investigation process may take up to ten (10) business days for completion.

SECTION 2: LOSB PROGRAM

I. SCOPE of LOCALLY OWNED SMALL BUSINESSES PROGRAM (LOSBS) (Amendment by Ordinance #471))

It is policy of Shelby County Government to establish and implement guidelines for increasing the number of contracts between the County and Locally Owned Small Businesses (LOSBS) owners. The Board of Commissioners of Shelby County deems it necessary and desirable to continue the operation of the Locally Owned Small Business Purchasing Program for the Shelby County Government.

The Board of County Commissioners established by Ordinance (#471) special purchasing procedures for at least twenty percent (20%) of the annual purchases of goods and services by the Shelby County Government to be awarded to Locally-Owned Small Businesses.

11. ELIGIBILITY CRITERION

For purposes of this sub-part the eligibility criterion for locally owned small business is:

- A.** Any business with average annual total sales or receipts within its last three fiscal years prior to its application to the Locally Owned Small Business Purchasing Program of less than \$1,000,000 a year; except architecture and engineering firms, security companies, computer companies, roofing and contractors and vendors in the construction industry. Any architecture and engineering firm, roofing and contractors and vendors in the construction industry with average annual total sales or receipts within its last three fiscal years prior to its application to the Locally Owned Small Business Purchasing Program of less than \$5,000,000 a year. Any security company or computer company with

average annual total sales or receipts within its last three fiscal years prior to its application to the Locally Owned Small Business Purchasing Program of less than \$15,000,000 a year.

- B. Such business shall be headquartered and physically located in Shelby County and owned by one or more residents of Shelby County with a real, substantial, and continuing ownership of at least fifty-one percent (51%) of the business.
- C. The business must be eligible to operate in Shelby County and shall be authorized to do so under the laws of the state of Tennessee.

12. DEFINITIONS:

The Locally Owned Small Business Purchasing Program for Shelby County shall be governed by the following rules and regulations as defined:

- A. **"Business"** shall mean and include individuals, sole proprietorships, unincorporated groups or associations, partnerships, corporations, joint ventures, and every other form of business entity.
- B. **"Commercially useful function"** shall mean the fulfillment of a subcontract by a bidder responsible for the materials, supplies, and services used in the performance of the contract. To determine whether a subcontractor is performing a commercially useful function, the amount of work subcontracted shall be evaluated with respect to normal industry practices including whether the amount the subcontractor is to be paid under the contract is commensurate with the work it is actually to perform. The subcontractor does not perform a commercially useful function if its role is limited to a non-essential participant in a contract through which funds are passed in order to convey the appearance of meaningful and useful subcontractor participation.
- C. **"Joint venture, Consortium, and Partnership"** shall mean a business entity that is formed to contract with Shelby County through the Locally Owned Small Business Purchasing Program. The business entity shall have written documentation demonstrating that the eligible locally owned small business as defined herein has a real, substantial, and continuing ownership interest of at least fifty-one percent (51%), and shall be responsible for the daily management and control of the project. The business must be a certified locally owned small business.

13. LOSB AND PURCHASING PROGRAM RULES AND REGULATIONS:

The certification process includes the following steps:

- A.** The business shall submit a complete certification application to the Equal Opportunity Compliance Office (EOC).
- B.** The EOC shall review the application and make a determination and advise the applicant of eligibility within thirty (30) days of the receipt of the completed application and advise the applicant in writing as to its eligibility. LOSB certificates shall be sent to eligible applicants.
- C.** In the event the EOC determines that the business is not eligible, the written communication to the business shall include a detailed explanation for the denial.
- D.** To appeal the denial, the business must submit a written request to the EOC within ten (10) business days of receiving the denial notification.
- E.** If the denial is not reversed, the business may appeal to the chairman of the Board of Commissioners of Shelby County or to a commissioner delegated by the Board Chairman for a determination. The decision of the Board or its designee shall be final.
- F.** Certified businesses must re-certify annually. An application for re-certification must be submitted in compliance with the certification rules.
- G.** Any locally owned small business awarded a subcontract shall not sublet, subcontract, or assign any work or services awarded to it without the prior written consent of the Administrator of the EOC.
- H.** Quotes for prime contracts valued at under \$5,000.00, shall be solicited from locally owned small businesses on construction, professional services, and commodities and services contracts.
- I.** The Administrator of Purchasing shall identify construction contracts under \$5,000.00, for award to locally owned small businesses. Eligible businesses shall be placed on a rotation list according to their certification date. Businesses shall apply for placement on the list by submitting proof of certification with the County or a reciprocal agency certified with the County. There shall be separate contract rotation lists for each construction specialty. Quotes should be requested from the next two (2) vendors on the rotation list. The contract should be awarded to the lowest bidder and the second company is then moved to the bottom of the list. In the case of a tie bid the vendor with the earliest certification date shall be awarded the contract. If no locally owned small business is found to be responsive, the bid shall be opened to all available businesses.
- J.** Upcoming contracting opportunities will be reviewed by the Administrator of Purchasing in conjunction with the Administrator of the Equal

Opportunity Compliance Office to identify items of work that can be unbundled into smaller contracts.

- K.** On informal bid solicitations for purchases valued at \$25,000.00, or less, the Administrator of Purchasing shall target the solicitations to certified locally owned small businesses. There must be at least three (3) certified locally small owned businesses that provide the goods or services being procured. If no locally owned small businesses are found to be responsive, then the County may solicit bids for the goods or services from all other sources.
- L.** As to those purchases below the requirement for a formal bid solicitation (currently, under \$25,000.00) and not included in the locally owned small business set aside, the Administrator of Purchasing in conjunction with the Administrator of the EOC shall determine if any locally owned small business offers that product or service. If so, at least one such eligible locally owned small business should be included in the vendors contacted for an opportunity to bid, and the Administrator of Purchasing may designate the award of purchase order for the purchase of such goods and services from the identified locally owned small business.
- M.** The Administrator of Purchasing in conjunction with the Administrator of the EOC shall provide a preference for locally owned small businesses on competitive low bid solicitations. Said preferences shall not exceed five percent (5%) of the lowest possible responsive bidder. The preference shall be applied on a sliding scale in the following manner: A preference of up to five percent (5%) shall be allowed for contracts valued at \$500,000.00 and under. **(Revised, See Appendix (C)).**

 - 1)** A preference of up to three percent (3%) shall be allowed for contracts greater than \$500,000.00 and under \$1,000,000.00.
 - 2)** A preference of two percent (2%) shall be allowed for contracts greater than \$1,000,000.00.
 - 3)** For construction contracts over \$2,000,000.00 a two percent (2%) preference will be given to the bids of general contractors that meet the requirements of Section 1, Subparagraph B and which have locally owned small businesses as subcontractors when such locally owned small businesses collectively have fifty percent (50%) of the total prime contract award.
- N.** The Administrator of Purchasing shall, when feasible, divide a single bid package for any purchase of goods and services into two or more smaller projects. The Administrator of Purchasing in consultation with the Equal Opportunity Compliance Office shall determine when the smaller bid

packages may result in a greater number of bids by locally owned small businesses.

- O.** The Administrator of Purchasing, upon approval of the County Commission, may establish special insurance and bonding requirements for certified locally owned small businesses so long as they are not in conflict with the laws of the state of Tennessee.
- P.** As a prequalification criterion, a manufacturer doing business with the County shall document that they have locally owned small business distributors authorized to sell its product line at the regional or national level on contracts valued under \$25,000.00.
- Q.** The Administrator of Purchasing, with the approval of the Mayor, shall adopt, promulgate, and may from time to time amend rules and regulations not inconsistent with the provisions of this Ordinance effectuate and implement the Locally Owned Small Business Purchasing Program within the intent of this Ordinance.
- R.** On a quarterly basis, the Administrator of Purchasing in conjunction with the Administrator of the EOC shall provide to the Mayor and Board of Commissioners of Shelby County a locally owned small business utilization report. The report shall include a summary of the purchases selected for LOSB participation, as well as a listing of the contracts awarded to locally owned small businesses for the quarter, the total dollar amount of the awarded contracts, and the total amount of purchases for the period.
- S.** The locally owned small business utilization reports shall be posted on the Equal Opportunity Compliance webpage. The reports shall be searchable by (1) department, (2) award and payment date, (3) prime contractor and subcontractor ethnicity and gender, (4) certification status, (5) award amount, and (6) industry. Change orders, amendments, and substitutions shall be separately reported by prime contract, department, and industry. Good faith effort waivers to the subcontract goal or failure to meet the subcontract goal shall also be published in the utilization reports. The reports shall be downloadable into Microsoft Word and Excel formats at no cost to the user.
- T.** The Equal Opportunity Compliance webpage shall maintain a directory listing certified locally owned small businesses. The listings shall include the business's name, National Institute of Government Purchasing (NIGP) or North American Industry Classification System (NAICS) code, and the business's contact information. The directory shall be updated monthly to reflect new certifications or changes to existing certifications. The directory

shall be downloadable in Microsoft Word and Excel formats at no cost to the user.

14. SET ASIDE CLAUSE

- A. The Administrator of Purchasing in conjunction with the Administrator of the EOC shall identify certain goods and services contract opportunities to be set aside for prime contracts valued at \$15,000 or less for purchasing from locally owned small businesses. After adhering to all other bidding and purchasing requirements of the County, not inconsistent with this part, if no bids are received from locally owned small businesses, then the County may solicit bids for goods or services from all other sources.
- B. Locally owned small businesses that are also certified as minority or woman-owned enterprises shall be counted towards both the locally owned small businesses and minority and woman-owned business enterprise contract goals.
- C. The Administrator of Purchasing, in conjunction with the Administrator of the Equal Opportunity Compliance Office shall annually review the Shelby County Capital Improvement Program to determine projects with a construction cost of \$250,000.00 or more. Subcontracts valued at least ten percent (10%) of the construction costs of such project shall be awarded to locally owned small businesses as defined herein, except as set forth in sub-paragraph (vi) of *LOSB Ordinance (#471)*, either as part of the conditions of the solicitation for general contractors bidding on these projects, or as separate bids issued by the County for subcontracts that may be assigned to general contractors.
- D. A contractor's failure to meet the locally owned small business subcontractor goal at bid opening shall be grounds for rejecting the bid unless the contractor can show evidence of a good faith effort. Good faith effort elements are quantified to determine whether a prime contractor has made an effort to meet the locally owned small business contract goals. In order to be considered a responsive bidder, the prime contractor must achieve a minimum score of 80 points to demonstrate a sufficient good faith effort.

15. POINT SYSTEM

The point assignment and requirements to document evidence of good faith efforts are as follows:

- A. Advertising five **(5) points**: Opportunities for locally owned small businesses shall be advertised in three print or digital media outlets during the three weeks prior to the bid opening. A subcontracting opportunity

must be published in general circulation media, multicultural-focused media, trade association publications, or trade-related publications, and local publications at least twice, unless the solicitation waives this requirement.

- B.** Attend the Pre-bid Meeting five **(5) points:** Attendance at the pre-bid meetings is mandatory to comply with the good faith effort requirement. The contractor's name on the pre-bid meeting sign-in sheet will serve as documentation.
- C.** Bidder's Outreach to identify locally owned small businesses fifteen **(15) points:** Communication with locally owned small businesses through personal, frequent, and persistent contact by promptly returning telephone calls, facsimiles, and emails must be documented. Correspondence logs shall list the names of the businesses, the contacted representatives, and dates of contact. Copies of correspondence with the contacted businesses, including the responses received, shall be provided. Documentation can also include facsimile transmittal confirmation slips or written confirmation of receipt via email with the date of transmission. The contractor shall be required to contact at least three businesses.
- D.** Contact Follow-up fifteen **(15) points:** Prompt return of telephone calls, facsimiles, and emails after the initial solicitation is required. The follow-up shall consist of a telephone call, facsimile, or email during normal business hours at least two weeks prior to the bid opening. The prime contractor must maintain correspondence logs that list the subcontractors who were contacted, including the results of the contact. The log includes the names of the businesses and contact person, telephone number, dates of contact, and notes regarding the outcome of contact. The record shall also identify the scope of work each contacted subcontractor was asked to bid.
- E.** Identify Items of Work fifteen **(15) points:** Subcontracts shall consist of discrete items or projects that locally owned small businesses may find economically feasible to perform. The documentation shall include a list with descriptions of the specific items of work solicited from eligible businesses, as well as notices and advertisements targeting locally owned small business subcontractors.
- F.** Negotiate in Good Faith fifteen **(15) points:** Validation that bids, quotes, or proposals prepared by eligible businesses based on the subcontractor's standing within its industry or on membership in a specific group, organization, association, or political or social affiliation shall not be unjustifiably rejected. A written statement with names, addresses, and telephone numbers of subcontractors contacted and the negotiated price and services must be submitted. This list shall include dates of the

negotiations and the results, and document the bids received from businesses that could provide a commercially useful function.

- G.** Offer Assistance in Securing Financing, Bonding, Insurance, or Competitive Supplier Pricing ten **(10) points**: Locally owned small businesses shall be offered technical assistance regarding plans, specifications, and requirements of the contract in a timely manner to facilitate responses to solicitations. Contractors shall consider a certified LOSB's bid even if the certified locally owned small business cannot obtain a bond, unless lack of subcontractor bonding would cause the prime to lose its own bonding or prevent the prime from obtaining bonding, and should make efforts to assist interested businesses in obtaining financing, bonds, and insurance required by the County, as well as provide competitive pricing. The contractor shall provide a written description of the type of assistance, the company name, contact person, telephone number, the name of the person who provided the assistance, and that of the supplier who offered competitive pricing. So long as the contractor otherwise complies with this paragraph, it shall be entitled to the ten **(10) points** even if the LOSB is not able to ultimately obtain a bond.
- H.** Provide Timely Written Notification twenty **(20) points**: Solicitation of subcontract bids and material quotes from relevant locally owned small business shall be submitted in writing at least two weeks prior to the bid opening. Relevant businesses are those that could feasibly provide the goods or services required to satisfy the terms specified in the County's solicitation. When soliciting bids, quotes, and proposals, the contractor must provide the project name, the bidder's name, subcontract items, primary contact person's name and telephone number, information on the availability of plans and specifications, and the date on which the subcontractor's written bid is due to the prime contractor. Written notification will include verification of the transmission date, the recipient's name, and the business name. Documentation can also include facsimile transmittal confirmation slips or written confirmation of receipt via email with the date of transmission.

VII. ON-SITE COMPLIANCE REVIEW INSPECTIONS

Upon the submission of a written sworn complaint of non-compliance, the EOC may conduct an on-site inspection or desk audit of the project to determine whether the prime contractor has been utilizing the subcontractor in accordance with the contractual agreement for services. During the investigation period, the payment for services may be temporarily suspended pending the outcome of the investigation. The investigation process may take up to 10 business days for completion.

VIII. PAYMENT TO SUBCONTRACTORS

Payments to prime contractors shall be made within fifteen (15) days of the County receiving an undisputed invoice. Prime contractors shall be required to pay their subcontractors within 10 days of receipt of their invoice payment from the County. The prime contractor shall be penalized if the subcontractor is not paid in a timely manner. All contracts with prime contractors shall include the following language:

IX. PENALTIES

The penalty for non-compliance with the 10-day timely payment to subcontractor(s) shall include:

- A.** any prime contractor who violates the timely payment term to a subcontractor more than once in a (3) three-month period shall lose their EOC qualification number to do future business with the County for (3) three months.
- B.** any prime contractor who violates the timely payment term to a subcontractor more than twice in a (6) six-month period shall lose their EOC qualification number to do future business with the County for (6) six months.
- C.** any prime contractor who violates the timely payment term to a subcontractor more than (3) three times in a one-year period shall lose their EOC qualification number to do future business with the County for one-year. The prime contractor may appeal the above imposed penalty to the EOC Appeals Board.

SECTION 3:

I. RECIPROCAL CERTIFICATION REQUIREMENTS

Reciprocity -

Certification program includes reciprocity with local agencies that currently have an M/WBE certification program which comports with Shelby County's standards. To simplify the certification process to conduct business with Shelby County Government, EOC will offer reciprocal certifications to businesses already certified by completing a brief application available through the office of EOC.

Documentation Proof-

Proof of residency
 Proof of business location
 Affidavit of income (LOSB's Only)
 Current certification
 Shelby County Business License

****All certifications must be current* No on-site inspection is required.**

Credits/References

December 29, 2014, Shelby County Government commissioned Mason Tillman Associates, Ltd. to conduct a 2016 Legal Analysis and Disparity Study.

March 26, 1992, the United States District Court for the Western District of Tennessee, Western Division, enjoined the County from enacting an Ordinance, law, or policy containing race-conscious criteria without complying with the standards set forth in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

March 28, 2016, the findings of the 2016 Legal Analysis and Disparity Study were adopted by the Shelby County Board of Commissioners public meeting.

The Shelby County Government (County) as articulated in Article II Section 2.02 C and Article V Section 5.13 of the Shelby County Government Charter (Charter).

December 19, 2016, Item #15, ORDINANCE # 471 ORDINANCE AMENDING SHELBY COUNTY GOVERNMENT'S LOCALLY OWNED SMALL BUSINESS ORDINANCE # 324, ADOPTED ON MARCH 26, 2007.

December 19, 2016, Item #14, ORDINANCE # 472- ORDINANCE TO ESTABLISH THE SHELBY COUNTY MINORITY AND WOMAN BUSINESS ENTERPRISE PROGRAM AND TO AMEND CURRENT SHELBY COUNTY PURCHASING PROCEDURES.

December 17, 2018, Item #38, ORDINANCE NO. 500 TO AMEND ORDINANCE NO. 472, WHICH ESTABLISHED THE SHELBY COUNTY MINORITY AND WOMAN BUSINESS ENTERPRISE PROGRAM (M/WBE), TO AMEND THE FOLLOWING SECTIONS: (1) DEFINITIONS; (2) RACE AND GENDER-CONSCIOUS REMEDIES SECTION; AND (3) RULES AND REGULATIONS AND CORRESPONDING PURCHASING POLICIES FOR SHELBY COUNTY GOVERNMENT. Prepared by: Shep Wilbun, Moved by: Brooks, Seconded by: Turner Reviewed by: Marcy Ingram. SPONSORED BY CHAIRMAN VAN D. TURNER, JR.

APPENDICES

Appendix A: Race and Gender-Conscious Remedies Amendment *Adopted by Ordinance (#500) December 17, 2018.*

The construction subcontract goal shall be twenty-eight percent (28%) for MBEs, and the professional services subcontract goal shall be twenty-six percent (26%) for MBEs and fourteen percent (14%) for WBEs

**Prime contractors are prohibited from having an exclusive relationship with subcontractors. **

Appendix B: Residency Amendment by Ordinance (#473), *Adopted June, 26, 2017.*

An exemption to the Shelby County residency requirement may be granted by the Administrator of EOC to those eligible minority and/or women business owners who have operated the qualifying business within Shelby County for a minimum of ten (10) years and employ a minimum of eight (8) employees who are residents of Shelby County.

Second Residency Amendment Adopted by Ordinance (#500) December 17, 2018.

An exemption to the Shelby County Government residency requirement may be granted by the Administrator of EOC to those eligible minority and/or women owned business owners who have operated the qualifying business within Shelby County for a minimum of two **(2)** years and employ a minimum of three **(3)** employees who are residents of Shelby County.

Appendix C: Preference for Locally Owned Small Businesses on competitive low bid solicitations (removed the word construction)

The Administrator of Purchasing in conjunction with the Administrator of the EOC shall provide a preference for locally owned small businesses on competitive low bid ~~construction~~ solicitations. Said preferences shall not exceed five percent (5%) of the lowest possible responsive bidder. The preference shall be applied on a sliding scale in the following manner: A preference of up to five percent (5%) shall be allowed for contracts valued at \$500,000.00 and under. (pg.19) (M).

Appendix D: ORDINANCE 500 to AMEND ORDINANCE (#472)

Ordinance #472, Which Established the Shelby County Government M/WBE Program. Ordinance #500 to Amend the Following Sections: (1) Definitions; (2) Race and Gender-Conscious Remedies Section; and (3) Rules and Regulations and Corresponding Purchasing Policies for Shelby County Government. Prepared by Shep Wilbun, Sponsored by Chairman Van. D. Turner, Jr. Adopted December 17, 2018.